146

(2)

No. 09-460

Supreme Court, U.S.
FILED
NOV 18 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION AND MICHAEL SCHUH,

Petitioners,

v.

DAVID A. CLARKE, JR. AND EILEEN RICHARDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES R. SCOTT
Counsel of Record
OYVIND WISTROM
LINDNER & MARSACK, S.C.
411 E. Wisconsin Ave., Ste. 1800
Milwaukee, WI 53202-4498
Phone: (414) 273-3910

Counsel for Respondents

November 18, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals improperly apply *Connick v. Myers* by over emphasizing the motivation of the speaker – the context of the speech – in determining whether the employee spoke on a matter of public concern?

2. Did the Seventh Circuit improperly apply *Garcetti v. Ceballos* by finding that the Confidentiality Policy of the Milwaukee County Sheriff's Department did not constitute an improper prior restraint on protected First Amendment speech?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

CLARIFICATION OF THE RECORD 2

A. Respondents' version of the facts 2

B. Schuh's Reassignment 2

C. Confidentiality Policy – Rule 13.05 4

REASONS FOR DENYING THE WRIT 5

I. THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT SCHUH'S SPEECH DID NOT TOUCH ON A MATTER OF PUBLIC CONCERN BY CONSIDERING THE CONTENT, FORM AND CONTEXT OF HIS SPEECH UNDER *CONNICK V. MYERS* 5

A. The Seventh Circuit did not place an improper emphasis on the "context" of the speech at issue 5

B. There is no split in the circuit courts concerning the proper application of *Connick* 10

TABLE OF CONTENTS – Continued

Page

II. THE SEVENTH CIRCUIT PROPERLY FOUND THAT THE CONFIDENTIALITY POLICY DID NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT UNDER THE FIRST AMENDMENT 15

A. The Seventh Circuit never found that a public employee's speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection under *Garcetti v. Ceballos* 15

B. The Sheriff Department's Confidentiality Policy did not prohibit speech protected by the First Amendment 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Alinovi v. Worcester Sch. Comm., 777 F.2d 776 (1st Cir. 1985) 15

Barron v. Suffolk County Sheriff's Dept., 402 F.3d 225 (1st Cir. 2005) 14

Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007) 12

Campbell v. Galloway, 483 F.3d 258 (4th Cir. 2007) 12

Campbell v. Towse, 99 F.3d 820 (7th Cir. 1996) 6

Chaklos v. Stevens, 560 F.3d 705 (7th Cir. 2009) 6

Cioffi v. Averill Park Central School District Board of Education, 444 F.3d 158 (2d Cir. 2006) 14

City of San Diego v. Roe, 543 U.S. 77 (2004) 5

Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis, 42 F.3d 403 (7th Cir. 1994) 6

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) 16

Dennison v. County of Frederick, 921 F.2d 50 (4th Cir. 1990) 13

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995) 13, 14

Farhat v. Jopke, 370 F.3d 580 (6th Cir. 2003) 11

Garcetti v. Ceballos, 547 U.S. 410 (2006) 15, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Gustafson v. Jones, 290 F.3d 895 (7th Cir. 2002) 6, 8

Harris v. City of Virginia Beach, 69 F.3d 532 (4th Cir. 1995) 13

Kokkinis v. Ivkovich, 185 F.3d 840 (7th Cir. 1999) 9

Lee v. Nicholl, 197 F.3d 1291 (10th Cir. 1999).....12

Lewis v. Cowen, 165 F.3d 154 (1999) 14

Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) 12

Mitchell v. Hillsborough County, 468 F.3d 1276 (11th Cir. 2006).....10, 11

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993).....10

Morris v. Crow, 117 F.3d 449 (11th Cir. 1997).....10, 11

Mullins v. Town of Fairhaven, 284 F.3d 31 (1st Cir. 2002) 14

Phelan v. Cook County, 463 F.3d 773 (7th Cir. 2006) 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 6

Rankin v. McPherson, 483 U.S. 378 (1987) 6, 7

Reuland v. Hynes, 460 F.3d 409 (2d Cir. 2006).....14

Samuelson v. LaPorte Cmty. Sch. Corp., 526 F.3d 1046 (7th Cir. 2008) 16, 18

Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) 11

TABLE OF AUTHORITIES – Continued

Page

Schrier v. University of Colorado, 427 F.3d 1253 (10th Cir. 2005) 12

Sousa v. Roque, 578 F.3d 164 (2d Cir. 2009) 14

Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004) 6

United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) 16

Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994) 8

STATEMENT OF THE CASE

The Respondents, Milwaukee County Sheriff David A. Clarke, Jr. and Captain Eileen Richards, respectfully request that the Petition for Writ of Certiorari be denied.

The decision of the Seventh Circuit Court of Appeals was based on established precedent and the court correctly found that Petitioner Michael Schuh's speech was not protected under the First Amendment to the U.S. Constitution, as it did not touch on a matter of public concern. The Seventh Circuit properly looked at the "content, form and context" of the speech in question and determined that Deputy Schuh's sarcastic comments in the Union newsletter did not touch on a matter of public concern under this Court's holding in *Connick v. Myers,* 461 U.S. 138 (1983) and its progeny.

The Seventh Circuit also correctly found that the Milwaukee County Sheriff Department's Confidentiality Policy (Rule 13.05) did not constitute an improper prior restraint, as the confidentiality policy only restricted speech not protected by the First Amendment.

Nothing in the record before this Court warrants the granting of the Petition for Writ of Certiorari.

CLARIFICATION OF THE RECORD

A. Respondents' version of the facts

In its Statement of Facts to this Court, Petitioners have introduced disputed facts as well as matters which were not proposed as factual findings. The additional facts contained herein are intended to supplement and to clarify several misrepresentations contained in Petitioners' Statement of Facts.

B. Schuh's Reassignment

After the Memorial Day weekend in 2005, Milwaukee Deputy Sheriff's Association (hereinafter "Association") President Roy Felber spoke with Milwaukee Journal Sentinel reporter David Umhoefer about patrols of Sheriff David A. Clarke's residence and escorts at the airport. (R. 44, ¶ 115). No newspaper stories about the issue are in the record. (R. 46, ¶¶ 116-117; R. 50, ¶¶ 116-117).

In mid-June of 2005, Clarke posted a quotation from Deuteronomy on several roll-call bulletin boards. (R. 30, ¶ 12). Contrary to Petitioners' Statement of the Case, there is nothing in the record to suggest any connection between the roll-call posting and any "controversy" over the Sheriff's personal security detail. It was common practice for Clarke to post "inspirational messages" or other quotations at roll-calls. (R. 30, ¶ 13).

On July 22, 2005, the Milwaukee Deputy Sheriff's Association distributed an edition of its

newsletter, the *Star,* which contained Deputy Schuh's sarcastic retort to the Sheriff's roll-call posting. The retort consisted of two sentences and did not question the use of Milwaukee County Sheriff Department's resources for the Sheriff's personal benefit. (R. 30; ¶ 18).

Schuh believed that Clarke's roll-call quotation challenged his courage. (R. 27, ¶ 113; R. 36, ¶ 113). Schuh, therefore, wrote his response to "throw back at him what he threw at us." (R. 27, ¶ 112). Schuh's intent was to respond to the Sheriff's inspirational message and make a sarcastic comment about the Sheriff. (R. 27, ¶ 112; R. 36, ¶ 112). Schuh understood that his message questioned Clarke's courage, although he personally did not believe Sheriff Clarke was a coward or that he lacked courage. (R. 27, ¶ 111; R. 36, ¶ 112).

Schuh learned of the patrol of Clarke's residence by seeing an order on a roll-call board. (R. 27, ¶ 109; R. 36, ¶109). He learned through the "grapevine" that the Sheriff had an escort at the airport. (R. 27, ¶ 108; R. 36, ¶ 108).

Clarke responded to Schuh's sarcastic quip by transferring him from his bailiff position to the Community Facilitator Unit. (R. 30, ¶¶ 23-24). Schuh was assigned to patrol an area of Milwaukee's inner city during the day – he was always in uniform, armed and carried a police radio. (R. 30, ¶ 26). Schuh was not enthusiastic about the assignment and viewed it as punishment. (R. 30, ¶ 25). However, he

was not afraid during the assignment and was never threatened. (R. 30, ¶ 26).

Schuh worked on foot patrol in the Community Facilitator's Unit from July 25, 2005 through September 8, 2005. (R. 30, ¶ 27). For the balance of his time on the assignment, he had a squad car, and he eventually was reassigned, at his request, to the airport. (R. 30, ¶¶ 27, 29). Schuh lost no pay or benefits as a result of the reassignment. (R. 30, ¶ 28).

C. Confidentiality Policy – Rule 13.05

Since at least 1984, the Sheriff's Department had rules restricting the disclosure of official department business. (R. 30, ¶ 6). The original rule required employees to keep "departmental business confidential." (R. 30,¶ 6).

In July of 2005, Clarke directed Captain Eileen Richards ("Richards") to redraft the existing departmental confidentiality rules. Richards prepared a draft revision, relying on previously proposed revisions, the City of Milwaukee Police Department rules and the existing policy. (R. 30, ¶ 8). The draft proposal was circulated to various members of the command staff and was ultimately issued in final form on July 28, 2005. (R. 30, ¶¶ 8-9). The new rule required that employees "keep official agency business confidential." (R. 30, ¶ 9).

Schuh gave numerous interviews to both the print and television media after the adoption of the

new confidentiality rule and was never disciplined. (R. 27, ¶¶ 103-104; R. 36, ¶¶103-104). Association President Felber objected to the confidentiality rules as being vague and unclear. (R. 27, ¶ 101; R. 36, ¶ 101). However, he was unaware of any employee ever being disciplined for violating either the old or the new confidentiality rule. (R. 30, ¶ 11). There is no evidence in the record that the adoption of the new Rule 13.05 was related to Schuh's comment in the Association's newsletter.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT SCHUH'S SPEECH DID NOT TOUCH ON A MATTER OF PUBLIC CONCERN BY CONSIDERING THE CONTENT, FORM AND CONTEXT OF HIS SPEECH UNDER *CONNICK V. MYERS*.

A. The Seventh Circuit did not place an improper emphasis on the "context" of the speech at issue.

It is well-established that a public employee's speech is entitled to constitutional protection only if the employee is speaking as a citizen on a matter of public concern; speech is not entitled to protection if the employee is speaking "as an employee upon matters only of personal interest." *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004); *Connick*, 461 U.S. at

147; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Whether an employee's speech addresses a matter of public concern must be determined by the "content, form and context" of a given statement, as revealed by the record as a whole. *Rankin v. McPherson*, 483 U.S. 378 (1987) (citing, *Connick*, 461 U.S. at 147-48).

While the Seventh Circuit has noted that no factor is singularly dispositive, it has stated that the "content" of the speech is the most important factor. *See, e.g., Chaklos v. Stevens*, 560 F.3d 705, 714 (7th Cir. 2009); *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *Gustafson,* 290 F.3d at 907; *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996); *Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis*, 42 F.3d 403, 409 (7th Cir. 1994).

This does not mean that the other prongs under *Connick* should be ignored or that the motive of the speaker may not be important, as urged by Petitioners. In *Connick*, an assistant district attorney circulated a questionnaire within her office "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. The Court ruled that the content of only one question touched upon a "matter of interest to the community" – that concerning pressure to work in political campaigns. This Court considered the motivation of the speaker when it noted that the focus of Myers' questions was "not to evaluate the performance of the

office, but rather to gather ammunition for another round of controversy with her superiors." *Id.* at 148. As this Court noted, "these questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre*." *Id.* at 148. Although Myers was motivated by her desire to avoid a transfer to another department, this Court nevertheless found that the speech was protected because of the strong underlying interest of the community to avoid public employees being pressured to work on political campaigns. *Id.* at 149-50. While not dispositive, the motivation of the speaker was a relevant consideration in *Connick*.

The speaker's motivation was also relevant in *Rankin*, where both the majority and the dissent focused on what McPherson [the public employee] was trying to express. The majority looked at the motive for her speech when it analyzed the context of McPherson's speech by considering her criticism of the President's policies which immediately preceded her alleged protected comment. *Rankin*, 483 U.S. at 386-87. Indeed, the dissent was critical of the majority's emphasis on the speaker's motivation in determining whether the speech touched on a matter of public concern. *Id.* at 396-97.

The *Connick* decision also supports the proposition that certain statements, i.e., those touching on core First Amendment values or inherent public concerns, will survive the threshold test even if the employee was partially motivated by personal concerns. *Id.* at 148-49. Consistent with that notion,

the Seventh Circuit has noted "that a public employee speaks out in part for personal reasons will not necessarily remove the speech from the scope of public concern." (App. 12); *citing Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006); *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002); *Zorzi v. County of Putnam*, 30 F.3d 885, 897 (7th Cir. 1994) ("[T]he mere fact that an employer's statement is an outgrowth of his personal dispute does not prevent some aspect of it from touching on matters of public concern. . . ."). The Seventh Circuit did not exclusively look at the context of Deputy Schuh's comment. The court correctly applied *Connick* and cogently and thoroughly examined the "content, form *and* context" of the comments as revealed by the whole record. (App. 11-19). It did not consider Schuh's motivation's myopically.

The court first noted that the "form" of Schuh's statement weighed in favor of constitutional protection; the newsletter included political commentary and was distributed beyond Department employees. (App. 13).

With respect to the "content" of the speech, the court was not convinced that Schuh's statement actually spoke to or protested government waste, as found by the district court. The Seventh Circuit found that a simple reading of Schuh's comment reflected that he did not comment directly on the waste of taxpayer dollars or the impact of the Sheriff's conduct on the availability of officers for more legitimate purposes. (App. 14). In fact, a person reading Schuh's comments would be hard-pressed to understand its

intended message unless the person was familiar with the background. That was also the case in *Connick*, where the Court noted that the questionnaire prepared by Meyers, if released to the public, would not convey any meaningful information. *Connick*, 461 U.S. at 148. While the appellate court reluctantly found that the content of Schuh's speech related to a matter of public concern, the fact that any reference to governmental waste was indirect and tangential, resulted in the "context" of the speech becoming more important.

The court did not place an impermissible emphasis on the context – the motivation of the speaker. Rather, the court found that under the circumstances, the context of the speech warranted a finding that the speech was not protected. Indeed, Schuh's testimony concerning his motivation was quite telling. When asked why he issued the retort in the Association's newsletter, Schuh responded that he wanted to "throw back at [Sheriff Clarke] what he threw at us." He intended to make a sarcastic comment about the Sheriff's courage, although he did not believe that the Sheriff lacked courage.

Not unlike the plaintiff in *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999), who employed a much more public platform for his comments, Schuh's comments in the *Star* were not designed to address a matter of public concern. Schuh's purely personal motivation in making the comments, when coupled with the limited public concern as revealed by the content of his speech, resulted in a correct finding by

the Seventh Circuit that Schuh's speech did not touch on a matter of public concern.

B. There is no split in the circuit courts concerning the proper application of *Connick*.

Petitioners have alleged a split in the circuit courts concerning the application of the three-prong test under *Connick*. They assert that several circuit courts have improperly emphasized the motivation of the speaker, while other courts have completely ignored motivation in determining whether speech touches on a matter of public concern. A review of the circuit courts' decisions concerning this element fails to reveal any divergence in the application of the *Connick* test.

Petitioners first contend that the Sixth, Tenth and Eleventh Circuits have placed "extensive emphasis" on the motivation to the detriment of the other two factors under *Connick*. This is simply not accurate.

The Eleventh Circuit has consistently applied the *Connick* test and noted that all three elements must be considered, as revealed by the record as a whole. *Morris v. Crow,* 117 F.3d 449, 457 (11th Cir. 1997) (*citing Morgan v. Ford,* 6 F.3d 750, 754 (11th Cir. 1993)). The Eleventh Circuit noted that while an employee's motivation is not dispositive, it is *a* factor that should be considered in determining whether speech touches on a matter of public concern. *Mitchell*

v. Hillsborough County, 468 F.3d 1276, 1283-84 (11th Cir. 2006) (*citing Morris*, 117 F.3d at 457). The fact that the Eleventh Circuit has discussed the motive of the speaker in certain circumstances does not mean that the court is misapplying the *Connick* test. Indeed, in discussing the relative import of each of the three prongs, the Eleventh Circuit recently noted that "content" is the most important factor in assessing whether speech touches on a matter of public concern. *Mitchell,* 468 F.3d at 1284. The Eleventh Circuit has not improperly elevated "context" as being more important than "content" or "form" under the *Connick* inquiry.

The Sixth and Tenth Circuit Courts of Appeals have similarly stressed that all three factors, including the content and form of the speech, are important considerations under *Connick*. For instance, in its decision in *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006), the court noted that each of the three factors must be considered and that the entire speech does not have to address matters of public concern, as long as some portion of the speech does. *Id.* at 256-57.

Even in *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2003), a decision cited by Petitioners, the Sixth Circuit noted that it was guided by *Connick,* which the court described as the "most instructive case on this issue." *Id.* at 589. In analyzing the speech, the court noted that the employee's motive for engaging in the speech was relevant, but not dispositive. The court correctly noted that defendant's argument that the

speaker's motivation was dispositive of whether the speech touched on a matter of public concern, was in direct conflict with *Connick*. *Id.* at 591-92.

The Tenth Circuit has likewise not improperly elevated the motive of the speaker. The *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) decision cited by Plaintiff involved an English-only policy and the question of whether the policy involved a prior restraint on protected speech. Even in that context, the court noted that "content, form and context" were all relevant considerations of whether the policy restrained speech touching on a matter of public concern. *Id.* at 1310. Indeed, the Tenth Circuit has consistently considered the content, form and context of the speech under *Connick*. *See, e.g., Brammer-Hoelter v. Twin Peaks Charter Academy,* 492 F.3d 1192, 1205 (10th Cir. 2007); *Schrier v. University of Colorado*, 427 F.3d 1253, 1263 (10th Cir. 2005); *Lee v. Nicholl,* 197 F.3d 1291, 1295 (10th Cir. 1999).

Petitioners also contend that the First, Second and Fourth Circuits apply *Connick* without considering the motivations of the speaker. This is also incorrect.

Petitioners cite to the decision in *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007) for the proposition that the Fourth Circuit employs an improper test under *Connick*. To support that claim, they note that the court found that a letter touched on a matter of public concern even though the bulk of the letter related to a personal grievance. That notion

is correct and comes directly from this Court's decision in *Connick*, where the Court wrote that the entire speech does not have to address matters of public concern, as long as some portion of the speech does. *Connick*, 461 U.S. at 149.

The Fourth Circuit has indeed considered motivation as a relevant factor in applying the *Connick* test. *See Harris v. City of Virginia Beach,* 69 F.3d 532, fn. 7 (4th Cir. 1995) (noting that Fourth Circuit case law has stressed the significant role that context plays in combination with content and form); *Dennison v. County of Frederick*, 921 F.2d 50, 54 (4th Cir. 1990) ("Although [plaintiff's] allegations appear to be of public interest, when they are considered in the context of what actually occurred . . . they are more properly viewed as essentially a 'private' matter between employer and employee.").

In *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995), the plaintiff was speaking to a neighborhood organization about zoning issues facing a proposed real estate development. In the course of that meeting, he gave legal advice to the assembled members of the organization that tended to undermine an earlier managerial decision that his supervisor made. DiMeglio's supervisor reprimanded him and transferred him to a new assignment. The Fourth Circuit upheld the supervisor's actions by finding that DiMeglio's speech was not protected because he expressed a personal opinion, and the self-serving aspect of his behavior was an important

consideration in the court's decision to affirm the personnel actions taken against him. *Id.* at 804.

The Second Circuit similarly has considered the speaker's motive. In *Lewis v. Cowen*, 165 F.3d 154 (1999), the circuit suggested that in analyzing whether speech touched on a matter of public concern, "the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Id.* at 163-64. Yet, the court does not believe that the speaker's motive is dispositive. *See Sousa v. Roque*, 578 F.3d 164 (2d Cir. 2009); *Reuland v. Hynes*, 460 F.3d 409, 411 (2d Cir. 2006) ("the speaker's motive, while one factor that may be considered, is not dispositive as to whether his speech addressed a matter of public concern."); *Cioffi v. Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006) ("although the speaker's overall motivation was personal, that fact was not dispositive.").

The First Circuit similarly has held that the inquiry into the content, form and context of speech may require an analysis of the speaker's motive. *See Barron v. Suffolk County Sheriff's Dept.*, 402 F.3d 225 (1st Cir. 2005) ("public employee's speech that would not necessarily qualify, on the basis of its content alone, as a matter of inherent public concern . . . may require a more complete *Connick* analysis into the form and context of the public employee expression 'as revealed by the record as a whole.'"); *Mullins v. Town of Fairhaven*, 284 F.3d 31 (1st Cir.

2002); *Alinovi v. Worcester Sch. Comm.*, 777 F.2d 776, 787 (1st Cir. 1985) (concluding that speech found to be motivated by a purely personal issue did not implicate matter of public concern, notwithstanding the attenuated connection between the speech and the incident raising First Amendment concerns.).

In sum, none of the Circuit Courts of Appeal referenced by Petitioners have improperly applied the *Connick* inquiry to its First Amendment retaliation jurisprudence by either elevating context over content or form, or by ignoring the context of the speech all together. A Writ of Certiorari is not warranted on Petitioner's First Amendment free speech claim.

II. THE SEVENTH CIRCUIT PROPERLY FOUND THAT THE CONFIDENTIALITY POLICY DID NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT UNDER THE FIRST AMENDMENT.

A. The Seventh Circuit never found that a public employee's speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection under *Garcetti v. Ceballos*.

Petitioners completely misconstrue the Seventh Circuit's holding that the Sheriff 's Department's confidentiality policy did not constitute an impermissible prior restraint on protected speech. Petitioners argue that under *Garcetti v. Ceballos,* 547 U.S. 410 (2006), a

public employee who utters a statement as a citizen, based on information learned through his employment, is necessarily entitled to First Amendment protection.

Their rationale is fatally flawed for several reasons. First, the Seventh Circuit did not find that the confidentiality policy in question "restrict[ed] speech not made pursuant to the job duties of public employees," as urged by Petitioners. (Brief, p. 26). Rather, the court interpreted the Sheriff Department's confidentiality policy narrowly and found that it only applied to information grounded in the employee's official duties, which is not protected by the First Amendment. *Garcetti*, 547 U.S. at 421-22; *Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046, 1052 (7th Cir. 2008).

Second, Petitioner's argument is flawed because it assumes that all speech made as a citizen is protected, regardless of the source of the information and/or whether it touches on a matter of public concern. This is incorrect, as not all restrictions constitute unlawful prior restraints. For a restriction to qualify as an unlawful prior restraint, the employee must have an interest in the speech as a citizen commenting on a matter of public concern. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465-66 (1995); *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004). Public employees who speak pursuant to their official duties "are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421. Therefore, a policy that only regulates speech

that owes its existence to an employee's official duties is not prohibited by the First Amendment.

B. The Sheriff Department's Confidentiality Policy did not prohibit speech protected by the First Amendment.

The Seventh Circuit did not expand the scope of *Garcetti v. Ceballos,* in addressing the Sheriff's Departments Confidentiality Policy, as the court did not find that the confidentiality policy restricted speech not made pursuant to the job duties of a public employee.

In addressing the Sheriff's Department's Confidentiality Policy, which required law enforcement officers to keep "official agency business confidential," the Seventh Circuit concluded that the policy did "not apply to speech protected by the First Amendment." (App. 22-23). While Petitioners had argued for an expansive interpretation of the phrase "official agency business," the Seventh Circuit declined to read the policy so broadly, and rather found that the policy only regulated speech "grounded in the public employer's professional duties." (App. 23). The Seventh Circuit interpreted the confidentiality policy narrowly by focusing on the inclusion of the terms "official," "agency" and "business," and in particular the term "official." The court found that the inclusion of such limiting terms meant that the policy was intended by the Sheriff's Department to only restrict official

business "grounded in the public employee's professional duties." (App. 19-25).

As such, because the confidentiality policy only regulated speech that was "grounded in the public employee's professional duties," the court found that the policy was not an impermissible prior restraint. (App. 23). This is so because speech that is "grounded in the employee's professional duties," is not protected by the First Amendment, regardless of the role in which it is spoken. *Garcetti*, 547 U.S. at 421-22; *Samuelson*, 526 F.3d at 1052 (*citing Garcetti* and holding that the school district's chain of command policy did not constitute a prior restraint because it only restricted speech that was grounded in the employee's professional duties, which was not protected by the First Amendment.)

The Seventh Circuit's decision in this case did not stray from these well-settled principles. Just as in *Samuelson,* where the court narrowly interpreted the school district's chain of command policy, the Seventh Circuit here narrowly interpreted the Sheriff Department's Confidentiality Policy to only restrict speech that was not protected by the First Amendment.

That interpretation was supported by the record which did not reveal any employees being disciplined for violating the policy. The policy did not appear to deter speech either, as Schuh provided several public interviews about the Sheriff and his policies and was never disciplined.

Nothing in the Seventh Circuit's decision concerning the department's confidentiality policy warrants Supreme Court review.

CONCLUSION

For the reasons articulated herein, Respondents request that the Supreme Court deny the Petition for Writ of Certiorari.

Dated this 18 day of November, 2009.

Respectfully submitted,

JAMES R. SCOTT
Counsel of Record
OYVIND WISTROM
LINDNER & MARSACK, S.C.
411 E. Wisconsin Ave., Ste. 1800
Milwaukee, WI 53202-4498
Phone: (414) 273-3910

Counsel for Respondents